No. 90-900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE RECTOR, WARDENS AND MEMBERS OF THE VESTRY OF ST. BARTHOLEMEW'S CHURCH, *Petitioner,*

v.

THE CITY OF NEW YORK AND THE LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK *Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF COUNCIL ON RELIGIOUS FREEDOM AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Establishment Clause of the First Amendment to the United States Constitution has been violated by the New York Landmarks Law because the religious practices of St. Bartholomew's Church has been substantially inhibited and the law has caused the City and the courts to become entangled in religious affairs.

2. Whether the Free Exercise Clause of the First Amendment to the United States Constitution has likewise been violated by the New York Landmarks Law, in spite of *Employment Division, Dep't of Human Resources of Oregon* v. *Smith*, ___ U.S. ___, 110 S. Ct. 1595 (1990), *rehearing denied*, 110 S. Ct. 2605 (1990), because of the governmental burden which the law has placed on the legitimate actions of the Church.

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BRIEF OF COUNCIL ON RELIGIOUS FREEDOM AS AMICUS CURIAE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

The Council on Religious Freedom is a national nonprofit corporation which was formed to uphold and promote the principles of religious liberty. The objectives and purposes of the organization include protection of churches and other religious organizations from government intrusion into their internal affairs.

Its Board of Directors is composed of individuals who are active in religious affairs, some in an official capacity and some on a lay basis, and who recognize the importance of preserving and promoting the constitutional principles of the free exercise

of religion and opposing any encroachment by private or governmental agencies which limit or tend to inhibit the free exercise of religion.

The Council on Religious Freedom is concerned with the growing trend of state landmarks laws which designate church buildings as landmark sites and thereafter attempt to control the church's internal affairs, including the way in which the church utilizes its sacred property, and encroach upon the authority of the church in determining how it will expend its funds for its religious mission.

This case, amicus believes, represents a prime example not only of the intrusion of a governmental agency into religious affairs but also the resultant involvement of the judiciary in matters that must, under the First Amendment, be left to the decision-making authority of the church.

Both petitioner and respondents, through their respective counsel of record, have consented to the filing of this brief, and said letters of consent accompany the filing of this brief.

SUMMARY OF ARGUMENT

The New York Landmarks Law violates the Establishment Clause of the First Amendment by both substantially inhibiting religion and creating excessive entanglement between church and state. The Establishment Clause is violated in this case because the Landmarks Law directly inhibits the Church in carrying out its religious mission and requires civil authorities (both administrative and judicial) to involve themselves in intimate church administrative matters.

In this case the trial court substituted its judgment for the judgment of the church vestry in determining whether St. Bartholomew's Church must continue to carry out its religious mission in its own cramped existing facilities. The district court, and subsequently the court of appeals, held that it is the

Church's burden to prove that it can no longer carry out its work in its present facilities before being permitted by the City to alter its church building located on its own land in a neighborhood consisting of skyscrapers and commercial establishments because of the City's interest in preserving historical landmarks.

The trial court below rejected the Church's claim that the Landmarks Law, as applied to St. Bartholomew's Church, resulted in excessive entanglement because the court believed that the excessive entanglement doctrine only applied to programs in which state aid to religious institutions requires extensive and continuous monitoring of church activities.

The court of appeals, although acknowledging that the entanglement clause doctrine was too narrowly applied by the district court, concluded that the factual situation in this case was akin to the facts in *Jimmy Swaggart Ministries* v. *Board of Equalization*, ___ U.S.___, 110 S. Ct. 688 (1990). An examination of the law and its application disproves this mistaken conclusion. Unlike the *Swaggart* case where the claimed entanglement related basically to tax accounting, the New York Landmarks Law gives to a public agency, and ultimately the courts, power to determine whether a church must continue to carry out its religious mission in its own existing facilities. The New York Landmarks Law also empowers an administrative agency, and ultimately the courts, to determine whether the cost of repair and rehabilitation of a church facility is beyond the means of the church. The court of appeals, therefore, was clearly in error in equating the New York Landmarks Law with the decision of this Court in *Swaggart*.

The requirements of the Landmarks Law, in fact, guarantee the type of entangling contact which this Court has previously struck down in such cases as *New York* v. *Cathedral*

Academy, 434 U.S. 125 (1977). It also improperly places the burden upon the church to establish in a fact-finding hearing that the church cannot carry out its religious mission in its existing facilities.

It is not the function of government to determine how church funds dedicated to a religious ministry should be spent, and the constitutional problem is exacerbated by requiring a church to prove and quantify the extent of hardship it would suffer in order to utilize its funds in the way demanded by the state with the resultant inquiry by a city commission, and ultimately by the courts, into the specific details of church income and spending. Since government is prohibited from contributing tax funds to a church, it is equally constitutionally repugnant for any arm of the state to dictate how the church's treasury will be utilized by the church in carrying out its religious mission.

The Landmarks Law also violates the free exercise guarantees of the First Amendment. The court of appeals rigidly applied the recent holding of this Court in *Employment Division, Dep't of Human Resources of Oregon* v. *Smith*, ___ U.S. ___, 110 S. Ct. 1595 (1990), *rehearing denied*, 110 S. Ct. 2605 (1990), ignoring the fact that this case did not involve socially harmful conduct, and the Landmarks Law is not an across-the-board criminal prohibition on a particular form of conduct.

This case also falls within the "hybrid situation" noted in *Smith* since, in addition to the free exercise claim of the Church, other First Amendment rights are implicated, including the rights of assembly and association. In addition, the Taking Clause of the Fifth Amendment is also directly involved.

Finally, *Smith* should not apply because the New York Landmarks Law is a law that lends itself to individualized

governmental assessment as to the reasons for the relevant conduct. Thus, the utilization of the free exercise test set forth in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), is appropriate.

This amicus suggests that the *Smith* decision utilized by the court of appeals in this case does not invalidate the "no alternative means" requirement articulated in the free exercise test set forth in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and the courts below, as well as the administrative agency, apparently gave no consideration as to whether there were alternative means by which the City could have accomplished its aesthetic purposes without excessive entanglement between church and state. If the no alternative means analysis previously utilized by this Court in free exercise cases is still relevant, a Landmarks Law must require the City—not the church—to prove that there are no alternative means by which the City may accomplish its objectives.

ARGUMENT

I. THE LANDMARKS LAW ON ITS FACE, AND AS IMPLEMENTED AND APPLIED, VIOLATES THE ESTABLISHMENT CLAUSE BY INHIBITING RELIGION AND CREATING EXCESSIVE ENTANGLEMENT BETWEEN CHURCH AND STATE.

The opinions of the lower courts in this case indicate an absolute insensitivity toward the role of civil authority vis-a-vis a church. They not only demonstrate how the New York Landmarks Law violates the Establishment Clause of the First Amendment to the United States Constitution but also embroil the judicial branch of government into matters strictly set apart from civil cognizance by the First Amendment.

The court of appeals observed that "the Church contends that by denying its application to erect a commercial office tower on its property, the City of New York and the Landmarks Commission (collectively "the City") have impaired the

Church's ability to carry on and expand the ministerial and charitable activities that are central to its religious mission." *The Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church* v. *The City of New York, et al.*, 914 F.2d 348, 353 (2d Cir. 1990).

The court of appeals, in discussing the findings of the district court, noted that the district court was unconvinced concerning the Church's claims that "the Community House is an inadequate facility in which to carry out the various activities that presently comprise the Church's religious mission and charitable purpose." *Id.* at 357. The court of appeals stated that the district court "found that the Church failed to prove that the Community House is fundamentally unsuitable for its current use and that the cost of repair and rehabilitation is beyond the financial means of the Church." *Id.*.

The trial court in effect acted in the place of the church vestry in determining how the Church should expend its funds. This was attempted by the district court even after acknowledging that "[p]laintiff's claim of unconstitutionality as applied depends upon plaintiff's ability to prove that it can no longer carry out its religious mission and charitable purpose in its existing facilities because those facilities are inadequate and because it cannot afford to expend the sums necessary to make these facilities adequate." *The Rector, Warden and Members of the Vestry of St. Bartholomew's Church* v. *City of New York, et al.*, 728 F. Supp. 958, 966 (S.D. N.Y. 1989). The district court stated in its opinion that "[a]ssuming arguendo that plaintiff's charitable work is the exercise of religion for First Amendment purposes, *plaintiff must prove* that it can no longer carry out this work in its existing facilities to sustain its free exercise claim." *Id.* (emphasis supplied). It is difficult to imagine a much more flagrant intrusion by the judicial branch of civil government into church administrative affairs.

This amicus contends that the action of the trial court and the inquiry permitted by the New York Landmarks Law, to which the court lent its authority, violates the Establishment Clause of the First Amendment to the United States Constitution in two ways. First, it very directly inhibits the church in carrying out its religious mission as its vestry deems best; and second, it thrusts civil authorities (both administrative and judicial) directly into church administrative matters, thus creating excessive entanglement between church and state.

As this Court has stated, "[e]very analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from [the] cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13 (1971).

In *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 784 n.39 (1973), this Court stated:

> Our cases simply do not support the notion that a law found to have a "primary" effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion.

When interpreting a law in light of the Establishment Clause, courts must not stop their examination even if they find the first, or even a major, effect of an enactment is for secular purposes. Instead, they must look for other direct and immediate effects. Although the effects test is normally couched in terms of the advancement of religion, this Court has always stated that government may also not use its power to inhibit religion.

This Court has also in numerous decisions recognized that civil courts have absolutely no authority to determine any matters of church government, faith, or doctrine. *Presbyterian Church* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952).

The trial court, in discussing the Church's position that the New York Landmarks Law has created excessive entanglement between church and state, erroneously concluded that the excessive entanglement "doctrine has normally been applied in factual situations in which state aid to religious institutions requires extensive and continuous monitoring of church activities to ensure that government financing is being used solely for secular purposes" and is not applicable "where, as here, the government must make an inquiry into church finances for the limited purpose of determining the validity of the church's claim of financial hardship." *St. Bartholomew's Church*, 728 F. Supp. at 963.

The court of appeals gave scant attention to the entanglement issue commenting only in the court's footnotes that "[t]he Church also argues that the Landmarks Law involves an excessive degree of entanglement between church and state in violation of the establishment clause." 914 F.2d at 356 n.4. The court of appeals then observed that the district court had dismissed this argument on the basis "that the entanglement doctrine applies only to instances of government funding of religious organizations." *Id.* Apparently the court of appeals did not accept the district court's reasoning in that regard noting that in *Jimmy Swaggart Ministries* v. *Board of Equalization*, ___ U.S. ___, 110 S. Ct. 688 (1990), this Court considered an entanglement claim in the context of government taxation of the sale of religious materials by religious organizations.

The court of appeals nevertheless stated that in *Jimmy Swaggart* "[t]he Court found no constitutional violation, as the regulation imposed only routine administrative and recordkeeping obligations, involved no continuing surveillance of the organization, and did not inquire into the religious doctrine or motives of the organization." 914 F.2d at 356 n.4. The court then opined that "[t]hese same factors are of course largely true of the Landmarks Law," observing that "[t]he only scrutiny of the Church occurred in the proceedings for a certificate of appropriateness, and the matters scrutinized were exclusively financial and architectural." *Id.* The court concluded that "[t]his degree of interaction does not rise to the level of unconstitutional entanglement." *Id.*

It is difficult to understand how the Second Circuit could equate "the level of contact created by the administration of neutral tax laws," *Jimmy Swaggart Ministries* v. *Board of Equalization*, 110 S. Ct. at 699, with a situation contemplating litigation over the issue of whether the Church can or cannot continue to conduct its charitable activities or carry out its religious mission in its own existing facilities and whether the cost of repair and rehabilitation is beyond the financial means of the Church. In *Jimmy Swaggart* the claimed entanglement was indeed thin involving basically only accounting, but in this case under the Landmarks Law, much more than administrative recordkeeping is at stake.

The right of a church to be free from government intrusion into its internal affairs is not limited to government officials walking the halls of parochial schools to see how public funds are being used. Neither is it limited to matters of faith and doctrine. The Constitution requires "a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff* v. *St. Nicholas Cathe-*

dral, 344 U.S. 94, 116 (1952). *See also Presbyterian Church* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976).

The provision of the New York Landmarks Law giving a public agency and ultimately the courts authority to require a church to present "sufficient evidence" of whether it can any longer conduct its own charitable activities or carry out its religious mission in its existing facilities is a far cry from *Swaggart*. The New York Landmarks Law which permits an administrative agency, and ultimately the court, to determine whether the cost of repair and rehabilitation of a church facility is beyond the means of the church is nowhere close to the factual situation in *Swaggart*.

This requirements of the Landmarks Law, in fact, guarantee the type of entangling contact between church and state which this Court found to be constitutionally offensive in *New York* v. *Cathedral Academy*, 434 U.S. 125 (1977). In that case this Court determined that a statutory requirement whereby the New York Court of Claims was required to review in detail expenditures for which reimbursement was being claimed by a parochial school in order to assure that state funds were not given for sectarian activities was itself unconstitutional, stating:

> But even if such an audit were contemplated, we agree with the appellant that this sort of detailed inquiry into the subtle implications of in-class examinations and other teaching activities would itself constitute a significant encroachment on the protections of the First and Fourteenth Amendments.

Id. at 132.

In pointed contrast to what the Second Circuit said in this case, in *Cathedral Academy* this Court then stated:

> The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment, and it cannot be dismissed by saying it will happen only once.

Id. at 133.

The court of appeals in this case noted that the Church had contended that its financial condition did not allow it to make the necessary improvements and to continue its programs but observed that the district court had "found that appellant had failed adequately to prove this assertion." 914 F.2d at 359. The court below, however, completely missed the point that for a church to be compelled to go before an administrative agency or a court of law to prove its financial condition or its ability to continue its ministry is exactly the type of entanglement which cannot be constitutionally countenanced.

The First Circuit Court of Appeals, for example, found that a government commission investigating the cost of private education violated both of the Religion Clauses when it included religious schools in its investigation. *Surinach* v. *Pesquera de Busquets*, 604 F.2d 73 (1st Cir. 1979). The court there stated that "in the sensitive area of First Amendment religious freedoms, *the burden is upon the state* to show that implementation of a regulatory scheme will not ultimately infringe upon and entangle it in the affairs of a religion to an extent which the Constitution will not countenance." *Id.* at 75-76 (first emphasis supplied; second emphasis in original). In *Surinach* the court, after reviewing *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), and *Walz* v. *Tax Commission*, 397 U.S. 664, 667 (1970), stated:

> Accordingly we believe that the constitutional perils of the compelled disclosure of cost information must be assessed and the Commonwealth's interest in that disclosure justified in view of the purpose for which the information was solicited.

Id. at 76. The court in *Surinach* noted that even though at that point in time there had not been a showing of any purpose to inhibit religion, the effect of the Commonwealth's actions "constitutes a palpable threat of state interference with the internal policies and beliefs of these church related schools." *Id.* at 76-77. Pertinent to this case is the concern expressed in *Surinach* that "the value judgments and senses of priorities" of the church and government were "likely to be grounded in wholly different concerns." *Id.* at 77. The court also expressed its concern about church decisions being ultimately subject to public hearings during which there would be a required "disclosure of the schools' finances" requiring disclosure of amounts of donations and details as to expenditures. The court found that "[s]uch an entanglement between the affairs of church and state is 'an independent evil against which the Religion Clauses were intended to protect.'" *Id.* at 78.

The *Surinach* court also was troubled by a governmental program that requires the state to distinguish between, and thus determine, what is religious and what is secular. *Id.* at 78. The very process which St. Bartholomew's was required to follow in order to expand and modernize its own facilities for its ministry in essence subjects it to an administrative, and later judicial, determination involving exactly such a fact-finding process. Proof of whether the Church could carry out its religious mission in its existing facilities by necessity includes administrative conclusions as to what in fact is a church's religious mission. This is a process not suitable for governmental discussion or determination. Rather, it is exactly what only the Church itself can in our constitutional form of government decide.

In *Lemon* v. *Kurtzman*, 403 U.S. at 614, this Court called for the close scrutiny of the degree of entanglement when there is state involvement with religious institutions. Specifically it was stated that "the objective is to prevent, as far as

possible, the intrusion of either into the precincts of the other." In *Lemon* the Court indicated that one need not prove that a government requirement creates excessive entanglement but rather only that there is a reasonable likelihood or probability of entanglement. *Id.* at 602. In a subsequent case this Court spoke of the "substantial risk" of potential church-state conflict. *Levitt* v. *Committee for Public Education*, 413 U.S. 472, 479-81, (1973).

In *Allen* v. *Morton*, 459 F.2d 65 (D.C. Cir. 1973), that court noted that government involvement with religion should be kept to a necessary minimum, and not only actual interference but the "potential for an appearance of interference with religion," should be avoided. *Id.* at 75.

This Court in *Walz* v. *Tax Commission*, 397 U.S. 664, 669 (1970), stated that it will "not tolerate either governmentally established religion or governmental interference with religion." In *Walz* this Court recognized the importance of chartering a judicial course "that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion." *Id.* at 672. This Court in *Walz* further emphasized the necessity of clearly examining governmental actions to ascertain if the government thereby becomes excessively involved in the affairs of the church.

Instead of deciding how a church may utilize its admittedly sacred property, a court should heed the advice of Justice O'Connor who warned in her concurring opinion in *Lynch* v. *Donnelly*, 465 U.S. 668, 687-88 (1984), that government can run afoul of the Establishment Clause by "excessive entanglement with religious institutions, which may interfere with the independence of the institutions." St. Bartholomew's Church and its parishioners have experienced just such interference. It is this interference that cannot be tolerated under our system of government.

Contrary to both the trial court's and Second Circuit's conclusions, it is the Church and its members that must determine how to allocate the financial resources of that Church. It is not the function of government to determine how church funds dedicated to a religious ministry should be employed. For government, whether it be the executive branch or judicial branch, to determine how church funds will be spent constitutes governmental imposition of its secular values on a religious institution.

The very thought of a court, be it state or federal, utilizing its civil authority to require a church to prove and quantify the extent of hardship it would suffer to utilize its funds in a way demanded by the state with the necessary inquiry into the spending and finances of the church strikes at the very heart of the separation required by the non-Establishment Clause of the First Amendment.

As government is prohibited from contributing three pence of tax funds to a church, it is equally abhorrent for government to dictate how three pence of a church's treasury will be utilized by a church in the carrying out of its religious ministry. The day that a court has the authority to decide how even three pennies of a church's funds will be spent in its internal operations is the last day of true freedom for the churches of this country.

II. THE LANDMARKS LAW ON ITS FACE, AND AS IMPLEMENTED AND APPLIED, VIOLATES THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

The court of appeals concluded that this Court's decision in *Employment Division, Dep't of Human Resources of Oregon* v. *Smith*, ___ U.S. ___, 110 S. Ct. 1595 (1990), *rehearing denied*, 110 S. Ct. 2605 (1990), has foreclosed St. Bartholomew's free exercise attack on the Landmarks Law.

This case can be differentiated from *Employment Division* v. *Smith* because this case does not involve actions contrary to socially harmful conduct. The majority decision in *Employment Division* v. *Smith* indicated several times that it was considering what was essentially criminal conduct. *See Smith*, 110 S. Ct. at 1599 and 1602. This Court stated that "[e]ven if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law." *Id.* at 1603. This amicus would urge this Court to find that this case is one that is beyond the unemployment compensation field and outside the bounds of generally applicable criminal law and thus open to application of traditional free exercise law as developed under *Sherbert* and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972).[1] Also, St. Bartholomew's in conducting its religious services, is not engaged in "socially harmful conduct," as this Court noted was the case in *Employment Division* v. *Smith*, 110 S. Ct. at 1603.

This case can be differentiated from *Employment Division* v. *Smith* because St. Bartholomew's Church has raised more than "just" free exercise issues. It has implicated several other First Amendment rights, including its rights of assembly and association as well as the Taking Clause of the Fifth Amendment. The goal of St. Bartholomew's is to better utilize its own facilities to carry out its religious mission, thus fulfilling this

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[1] The decision in *Employment Division* v. *Smith*, ____ U.S. ____, 110 S. Ct. 1595 (1990), has created ambiguity in the free exercise jurisprudence of this nation. This case provides the opportunity for this Court to clarify the impact of the Free Exercise Clause on government action which burdens a church's religious mission. At the very least, this Court could clearly state that *Smith* is confined to "an across-the-board criminal prohibition on a particular form of conduct." This case does not fall within such a prohibition.

Court's new requirement that the facts of a case present a "hybrid situation." 110 S. Ct. at 1602.

This case also can be differentiated from *Employment Division* v. *Smith* because the New York Landmarks Law is a law that lends "itself to individualized governmental assessment of the reasons for the relevant conduct." 110 S. Ct. at 1603. St. Bartholomew's is a landmark precisely because it is unique. The whole purpose of the statute in question is to deal with situations on a landmark-by- landmark basis. This case does not involve a statute that applies "across-the- board," without consideration to differences in historic properties. This case involves a statute being applied to a unique building on a one-of-a-kind basis. Amicus suggests there can be no better example of a case that lends "itself to individualized governmental assessment of the reasons for the relevant conduct."

Smith only limited the use of the "compelling interest" test of *Sherbert* v. *Verner*, 374 U.S. 398 (1963); it did not address the other aspects of the *Sherbert* analysis which places upon government the burden of demonstrating that there are no less restrictive alternatives by which government may accomplish its valid and legitimate objectives. *Smith*, 110 S. Ct. at 1604-05. The "no alternative means" requirement articulated in the free exercise test set forth in *Sherbert* predates *Sherbert* and may be found in our free exercise jurisprudence at least as early as *West Virginia State Bd. of Ed.* v. *Barnette*, 319 U.S. 624 (1943). Apparently, neither the administrative agency nor the courts below in this case gave any consideration to other alternative means by which the City could have accomplished its aesthetic purposes without excessive entanglement between church and state, such as permitting the use of an affidavit claiming "religious hardship" in the place of a quasi-judicial proceeding to determine "hardship." The City also was not, under the Landmarks Law, required to prove, as it should

have been, that there were no alternative means for the City to accomplish the objectives of the Landmarks Law.

In *Pillar of Fire* v. *Denver Urban Renewal Authority*, 509 P.2d 1250 (Colo. 1973), the Supreme Court of Colorado was confronted with a church's challenge to the "Urban Renewal Authority's decision to condemn [its church] on the ground that the free exercise of religion was threatened and impaired by the condemnation proceeding." *Id.* at 1252. In addressing that challenge, the Colorado Court stated:

> We, of course, recognize the extraordinary importance of the rights and freedoms engraved in the foundation of our country by the First Amendment of the Bill of Rights. Of all freedoms, freedom of worship may be the most precious to the spirit. Moreover, we all recall that our country was founded in large part by men and women who emigrated from lands where their form of worship was persecuted. Authority need not be cited to prove that the right to free exercise of religion is still vital in today's constitutional law.

Id.

The Colorado Supreme Court later extended the above free exercise reasoning in *Order of Friars Minor* v. *Denver Urban Renewal Authority*, 526 P.2d 804 (Colo. 1974). That case concerned the condemnation of nothing quite as sacred as the church itself but rather of a parking lot adjacent to the church. The church in that case claimed that "the lot is necessary to its operation, as it would impose a great difficulty upon many parishioners to attend were parking not available." *Id.* at 805. The Colorado Supreme Court, finding the case to be analogous to the situation in *Pillar of Fire*, vacated the trial court's order of immediate possession, and directed the court to hold a further hearing consistent with the findings in *Pillar of Fire* that the church was "entitled to a hearing at which the competing interests of the Renewal Authority and the church can be

weighed." *Id.* The court further observed: "Only after such a hearing and upon finding that there is a substantial public interest involved *which cannot be accomplished 'through any other reasonable means'* can the court proceed with the condemnation of the property." *Id.* (emphasis supplied).

In another eminent domain case, *Yonkers Racing Corp.* v. *City of Yonkers*, 858 F.2d 855, 871 (2d Cir. 1988), the Second Circuit (the appellate court here) considered the application of *Lyng* v. *Northwest Cemetery Protective Ass'n*, 108 S. Ct. 1319 (1988). In *Yonkers* the city had argued that *Lyng* held that the Free Exercise Clause does not prohibit governmental action that would substantially interfere with the practice of religion so long as the government's action is not actually coercive or penal in nature. However, the Second Circuit in *Yonkers* disagreed with the city stating, "[t]he *Lyng* Court declined to determine the 'exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs. . . .'" *Id.* The court of appeals then concluded that "[t]he Supreme Court merely held that 'whatever' the effect completion of the roadway might have on traditional Indian religious practices, the government could not be denied use of its own land," *id.*, and concluded that *Lyng* was distinguishable because "the government's use of its property involves significantly different considerations than the taking by the government of privately-owned religious property." *Id.* Likewise, this case involves action by government which restricts the Church's use of its own property.

The court of appeals here agreed with the district court that the Church failed to prove that it cannot continue its religious practice in its existing facilities. We believe, however, that under the free exercise analysis, which this Court has utilized over the years, when governmental action has imposed a substantial burden on religious practices, the government

must carry the burden of demonstrating that there are no other reasonable means to meet the government's primary objective. The district and circuit courts' analyses have turned this free exercise concept on its head placing the burden on the Church to prove there are no alternatives for it to accomplish its mission other than by altering the Church structure.

CONCLUSION

For the foregoing reasons, this amicus curiae respectfully requests that the petition for a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Second Circuit.

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Respectfully submitted,

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